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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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XMISSION, L.C., a Utah company

Plaintiff,

vs.

9 FOUR ONE MEDIA, a Florida company;  
ABOVE ALL OFFERS CORPORATION, an  
Oregon corporation; THE AFFILIATI  
NETWORK, INC., a Florida corporation;  
AGORA FINANCIAL, LLC, a Maryland  
limited liability company; FLUENT, LLC, a  
New York limited liability company; DOES  
1-10,

Defendants.

**DECLARATION OF DANIEL J  
BARKY**

Case No. 2:18-cv-00182-DBP

Magistrate Judge Dustin B. Pead

I, Daniel J Barsky, having personal knowledge of the matters asserted herein, do hereby declare as follows:

1. I am the General Counsel & Chief Compliance Officer of Fluent, LLC (“Fluent”).
2. Fluent is a Delaware limited liability company, registered to do business in the State of New York, whose principal place of business is located at 33 Whitehall Street, 15th Floor, New York, New York 10004.
3. Fluent is a digital marketing company that works with third-party publishers to provide marketing and advertising services.
4. As is common in the digital marketing industry, Fluent participates in advertising and marketing campaigns utilizing third-party publishers. In such campaigns, Fluent provides advertising content to publishers, and the publishers then distribute the advertisements to their audiences via email, among other methods. Fluent compensates the publishers based on certain agreed-upon triggering actions by the target consumers such as when the consumer “clicks” on the advertisement, visits a designated website, or purchases the advertised product or service.
5. In these marketing campaigns, including those engaged in by Fluent, all commercial emails are sent by the publishers, not by Fluent.
6. Fluent also has no involvement with, or control over, the origination, approval, or delivery of the emails. It does not see the emails before they are sent by the publishers; know where (i.e., the location or the recipient) the publishers send the emails; or decide the customers to whom the publishers should publish the emails. Fluent insists however that the publishers only send emails to customers that have agreed to receive them.

7. None of Fluent's business activities occur in Utah.
8. Fluent has never been registered to do business in Utah.
9. Fluent has never had any offices of any kind in Utah.
10. Fluent has never employed any persons in Utah.
11. Fluent has never owned or leased any commercial property or property of any kind in Utah.
12. Fluent has never had any assets in the State of Utah.
13. Fluent has never had a telephone or telephone listing in Utah.
14. Fluent has never undertaken to market or advertise in Utah or to target or direct any internet marketing directly to Utah residents.
15. Fluent does not maintain any bank accounts in Utah.
16. Fluent does not have any members or managers that reside in Utah.
17. Fluent does not have regular sales personnel in Utah, nor does it recruit employees in Utah.
18. Fluent generates almost no revenue (less than 0.9%) from Utah customers.
19. Fluent never had any contact with XMission until XMission sent its initial demand letter to Fluent on February 5, 2018.
20. At no point did any person associated with Fluent agree to submit Fluent to the jurisdiction or venue of any Court located in Utah.
21. On February 13, 2018, Fluent filed an action against XMission in the Southern District of New York seeking a declaration with respect to XMission's claims in its demand letter.

Respectfully submitted this 19th day of March 2018.

  
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Daniel J. Barsky

(\*I certify that I have the signed original of this document which is available for inspection during normal business hours by the Court or a party to this action.

\*Declaration electronically signed, pursuant to U.C.A. § 46-4-201(4) and District Of Utah CM/ECF and E-filing)

**CERTIFICATE OF SERVICE**

I hereby certify that on the 22<sup>nd</sup> day of March, 2018, I electronically filed the foregoing **DECLARATION OF DANIEL J BARSKY** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service.

/s/ Maralyn M. English